Supreme Court, U. S
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No. 80-345

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION, INTERNATIONAL PAPER COMPANY, W. KENT BISHOP, WHITE LUMBER SALES, INC., and GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC., JOHN C. PENNINGTON, TRUSTEE, and FREEMAN & HAWKINS, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION

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QUESTIONS EVOKING THE SUPERVISORY POWER

1. (a) *Whether* four months of *ex parte* work sessions conducted by a bankruptcy judge with one side to a vigorously contested, pending matter (decision unannounced) which produced a 40-page opinion and numerous orders that were researched, drafted, edited and typed in law offices for adversary parties, which not only ruled for them but expressly set the stage for a similarly prepared, enormous award of attorneys' fees in their favor, which contacts were without notice to or knowledge of opposing side, *constitute* a departure from the accepted and usual course of judicial proceedings.

(b) *Where* a bankruptcy judge announced orally a fee award for respondents; petitioners obtained sufficient evidence to inquire of the judge whether respondents had authored a 40-page "opinion" on a subject covered in the fee applications and the judge denied the charge from the bench; *and where* petitioner observed the judge having breakfast with respondent immediately prior to a hearing thereon which the judge denied from the bench, *did the judge possess* the requisite independence (free will) as a matter of law to resist respondents' draft language in a subsequently prepared, draft fee opinion exculpating respondents from alleged ethical violations; *or was the judge beholdened* to respondents as a matter of law since they could have divulged the truth of the aforementioned facts to the district court subjecting the bankruptcy judge to possible removal from office by majority vote thereof, the critical facts being admitted by respondents at a subsequent court of appeals' rehearing.

(c) Did such a judge possess the requisite independence as a matter of law to resist the temptation to exculpate himself from charges of "trial improprieties" (the specific charges not being acknowledged), or did he become "judge of his own cause."

2. *Whether* condonation by an Art. III district judge owing a duty of supervision over the Art. I bankruptcy judge (the former describing the latter's conduct as "not exemplary, but neither was it clearly erroneous"); affirmance of bankruptcy order awarding enormous attorneys' fees in absence of (non-existent) findings of fact and con-

clusions of law; failure to answer issues self-acknowledged concerning breach of codes of Judicial Conduct and Professional Responsibility in bankruptcy court; several *ex parte* conferences upon matters that were being, or would have been, vigorously contested resulting in court orders favorable to adversary parties, without notice to or knowledge of opposing side, *constitute* a departure from the accepted and usual course of judicial proceedings.

3. *Whether* an Art. III court of appeals owing a duty of supervision over a district court and aware of ethical charges against bankruptcy judge and respondents *sanctioned* a departure from the accepted and usual course of judicial proceedings in according clearly erroneous treatment to the bankruptcy judge's findings of fact..

4. *Whether* a proper exercise of the supervisory power *disqualifies* the bankruptcy and district judges; *voids* all order opinions signed by the bankruptcy judge; *vitiates* all orders and decisions of the district judge and court of appeals which accord "clearly erroneous" treatment to the bankruptcy judge's findings of fact; *acknowledges* the professional obligation of petitioners' lawyer to disclose improper conduct of Art. I and III judges; *extends* to said lawyer a qualified immunity from fee award for good faith action to bring improper conduct to the attention of the federal courts; *and disentitles* adversary parties which participated in *ex parte* work sessions from recovering fee award for unclean hands.

UNSETTLED FEDERAL QUESTIONS

5. *Whether* principles of Comity, Federalism and Fifth Amendment Due Process *require* Art. I and Art. III federal judges to adhere – not to lenient federal judicial ethics, but – to exacting standards of ethical conduct binding upon judges of State courts, in those geographical areas where the actions of federal judges impact upon those several States.

6. *Whether* an Art. I bankruptcy judge *has subject matter jurisdiction* to make a final, factual determination that certain conduct (occuring in large part before other courts) was perpetrated in bad faith and render a monetary judgment for adversary parties 145 times greater than the maximum fine said judge could levy if he had simply

adjudged the same conduct to be a criminal contempt of court committed in his presence.

7. *Whether* an unsuccessful litigant and his lawyer must be offered a *right to jury trial* when a fee award of $36,000 is sought before an Art. I bankruptcy judge for misuse of process where the judge's conduct reasonably could be criticized by the lawyer, as an officer of the court, as to guard the lawyer and his client against bias or mistake.

8. *Whether* an Art. I (or Art. III) federal judge *has the inherent power* to award an attorneys' fee to adversary parties for an opposing lawyer's naivete or missteps unmixed with bad faith.

QUESTIONS PRESENTING CONFLICT BETWEEN FIFTH CIRCUIT AND OTHER CIRCUITS

9. To justify a fee award, must an adversary party's attorneys' fees be *proximately* caused by the offending litigant's or his attorney's bad faith conduct, or must the fees simply bear a casual "but-for" relationship to bad faith conduct.

10. Is the standard of appellate review upon a trial court's findings of fact, adopted via *ex parte* work sessions, the "clearly erroneous" standard under Fed. R. Civ. P. 52.

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CORRECTION

September 18, 1980

p. 20 Only full paragraph, line 14: "Nos. 2, 2, 5" should read "Nos. 2, 3, 5".

III. REFERENCES TO NOTED OPINIONS AND ORDER IN COURTS BELOW

Fifth Circuit Case No. 78-3370, sometimes referred to herein as "the fee award case", is unreported and noted at *In re Georgia Paneling Supply, Inc.*, 617 F.2d 293 (5th Cir. Table 1980), *reinstating* [sic] 607 F.2d 1004 (5th Cir. Table), *vacated* 613 F.2d 312 (1979).

IV. GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

A. The *apparent* date of the judgment sought to be reviewed in the fee award case is May 9, 1980. However, a letter dated July 22, 1980 indicates that entry of original judgment was made *erroneously* upon *vacated* November 9, 1979 judgment. The error was corrected July 22, 1980 by issuance of a May 9, 1980 judgment. See App. at 154-157.

B. The date of the order denying petitioners' petitions for rehearing and petitions for rehearing *en banc* in the fee award case is June 3, 1980.

C. The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment by writ of certiorari is 28 U.S.C. Section 1254 (1) (1970).

V. CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED IN THE CASES

Sources are referenced in the preceding Table of Contents at pages ix and x which is a lengthy table of contents to "Part Three: Constitutional Provisions, Statutes, Regulations Involved", located in Petitioners' Joint Appendix, App. 169, to which petitioners respectfully call attention.

VI. STATEMENT OF THE CASE

> *"The putative intervenors have rather tactfully refrained from lodging a charge of 'collusion'* with respect to the trustee, defendant Aetna, and their respective counsel. [Emphasis added.] However, the procedural history of the litigation *may* suggest that the trustee's representation has been inadequate and that there *may* have been collusion, albeit solely for the purpose of terminating

troublesome and time-consuming litigation." [Emphasis in original.] [App. 160-161.]

Thus spoke the district judge, September 30, 1976, in an Order granting petitioners' motion to intervene in the trustee's plenary action against Aetna. By contrast, in response to petitioners' 60(b) motion filed May 31, 1977, the trustee stated that "[he] believes the purported motion of [petitioners] to be tantamount to the perpetration of a fraud on this Honorable Court." Trustee's Motion to Dismiss and Brief, filed June 10, 1977 at 22-23. Besides being strong language against one who had engaged in tactful restraint, this Court will realize the seriousness with which petitioners state the following argument.

Having two cases with a common origin petitioners were granted verbal permission by the clerk's office to file joint appendix and understand the two petitions will be circulated together. Because of space limitation, petitioners respectfully ask this Court's indulgence to allow them to present the facts in the related petition which they trust the Court will have opportunity first to review, and proceed thereafter with the following argument.

VII. FEE AWARD IS VOID BECAUSE ISSUED WHILE BANKRUPTCY JUDGE WAS AFFECTED WITH DISABLING BIAS AS A MATTER OF LAW

A. Misrepresentations of Material Fact.

The bankruptcy judge apparently lied on March 6, 1978 in denying that Aetna's counsel drafted the 40-page, 60(b) opinion. T 19. He lied because R. W. Ide III, a partner of the lawyer who drafted the 40-page opinion (C. Edward Dobbs), stated in open court on April 14, 1980 that the bankruptcy judge called his firm, asked for an order opinion denying the 60(b) motion, and his firm delivered it to the judge. The bankruptcy judge apparently lied on March 6, 1978 in denying he had breakfast with the trustee on September 20, 1977 immediately prior to remanded 60(b) hearing. T 65. He lied because D. L. Cronkright, attorney for the trustee (John C. Pennington), stated in open court on April 14, 1980 that the bankruptcy judge and the trustee had breakfast together the morning in question. Both lawyers' statements were made to a three judge panel

of the United States Court of Appeals on a (second) rehearing; their statements were impelled by the overwhelming proof adduced by petitioners. App. 249-252 247-248.

B. **A ROT in Bankruptcy Court.**

Once the lie was uttered, the presumption of regularity of judicial proceedings was rebutted as a matter of law, based on the following reasoning: The bankruptcy judge would know of the lie. He would know that the trustee whom he had breakfasted with would know of the lie. He would know that Aetna's lawyer who had written the 40-page opinion would know of the lie. His independence would be affected because they could inform the district court of the lies. If the latter would not have removed him immediately from office (after affording procedural due process), a reprimand and probable lack of reappointment would be indicated. If the bankruptcy judge had always so conducted his court, other lawyers – assured of secrecy and non-retaliation – would tell of similar incidents at any hearing, particularly at the circuit executive's fitness hearing during the proposed transition period under the bill which became the Bankruptcy Code of 1978.

Insidiously the lie would warp his judgment and his scruples. He would not be able to resist respondents' insistence on the inclusion of language in a fee opinion drafted for him that absolutely exculpated them from petitioners' charges of unprofessional conduct. He would not be able to resist his own survival instincts to exculpate himself from petitioners' charges of misconduct. He would not be able to withhold a malevolent desire to hurt petitioners; indeed, so to bury petitioners in distorted facts of virtually nonreviewable, credibility findings that no court would listen to petitioners, presuming he had been unjustly provoked.

These emotions are ones this Court can presume from knowledge of human nature – take judicial notice, if one prefers – and they form a disabling bias or prejudice as a matter of law. While occurring in a court setting, these facts form an extrajudicial basis for a disabling personal bias calling for mandatory judicial disqualification. *Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979).

C. Failure to Mention Petitioners' Charges In Any Order or Memorandum

There is a curious absence of reference to petitioners' ethical charges against the judge in the orders and memoranda signed by him after March 6, 1978, the date charges were made. T 20.Nevertheless, the plain implication of Ide's admissions in open court, April 14, 1980, is that Aetna's counsel prepared all orders and memoranda signed by the judge after (as well as before) March 6, 1978. Respondents were no more willing to specify the charges in the 37-page opinion than to acknowledge authorship of the 40-page opinion prior to March 6, 1978. However, there seems to be another reason: a written denial could be proven to be clearly erroneous by the then state of petitioners' proof, caused by the trustee's co-counsel's clerical gaff in having unexpurged time slips delivered to petitioners' counsel. Vague, unspecified "slander", "slander per se", "innuendos" and the like would suffice, nicely.

There could be no reliance on lack of a 28 U.S.C. Sec. 144 affidavit of disqualification because *Davis v. Board of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), rules that such an affidavit applies to judicial conduct prior to trial and a 28 U.S.C.A. Sec. 455 argument of disqualification can be raised for the first time in appellate court. Socking an undeserved $36,000 fine on petitioners in light of the ethical revelations made it inevitable that disqualification would be raised. Rather than deal with the issue forthrightly, the judge "stonewalled." Negative inferences on his intentions are justified.

D. Findings of Fact Infected with Bias.

For a judge to engage in self-justification in litigation in which his conduct has reasonably been called into question is tantamount to being "judge of his own cause." The bankruptcy judge *adjudged* that he "intended" to allow more time for the 60(b) hearing than two hours shown on his schedule (which included the fee application), No. 17; [1] that his unsolicited intrusions into the trial hearing were required by law, Nos. 19,[2] 26;[3] petitioners' "aspersions" upon his integrity and judicial conduct were false and

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[1] Alleged misstep (17) is refuted by a reference to the bankrupcy judge's calendar for September 19, 1977 (App. 254) that shows in a *two*

footnotes continued on next page

unsupported, Nos. 19,[4] 23,[5] 25.[6] Even ineffectual 28 U.S.C. Sec. 144 (1970) requires a judge to take sworn

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hour period on September 19 he intended to hear the 60(b) motion, Aetna's application for assessment of expenses and the trustee's application. The fact that ten times that amount was granted for the fee hearing demonstrates petitioners' motion was justified. Moreover this item distorts petitioners' reasons for a two-week hearing on the remanded 60(b) hearing (not three weeks as Aetna wrote for the judge). In no court is counsel's estimate of trial duration given literal weight by a court in scheduling its calendar; those determinations are for the court. Even if naive, a statement of opinion is not bad faith. Cf. *Walker v. Bank of America*, 268 F.2d 16 (9th Cir. 1959). The bankruptcy memo finds "improper purposes" because "in no instance was the evidence consistent or supportive of the [60(b)] claims." App. 122. Not only is such *post hoc* reasoning inappropriate, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), but it would raise the spector of a bad faith award against every litigant failing to carry his burden of persuasion. The memo claims that petitioners' efforts from September 13 to 19, 1977 were frivolous. Appellants had a jury trial scheduled September 19, 1977 at 10:00 A.M. and asked for a continuance, which was denied. In the middle of the hearing on September 20, District (now Circuit) Judge Albert J. Henderson, Jr.'s calendar clerk interrupted the proceedings to see if petitioners' counsel would be ready the next day for trial. Transcript September 20, 1977 at p. 92. This demonstrates abuse of petitioners and their counsel. Petitioners' motion to reassign the 60(b) proceeding to another bankruptcy judge was prescient since the judge and respondents had been engaging in substantial *ex parte* conferences prior to the date the motion was made, unknown to them. Finally Fed. R. Civ. P. 53 (e) allows a referee in bankruptcy to be appointed a special master. The judge himself thought that the district court's August 26, 1977 order of remand might be equivalent to a reference to a special master. Transcript, February 14, 1978 at p. 49.

[2] Alleged misstep (19) is an effort to suppress legitimate objections as "unwarranted," without citing to specific behavior that was so. However, Aetna's lawyer *admitted* to objectionable behavior; e.g., "Mr. Dobbs: First of all, I would like to apologize to Mr. Bishop for interrupting." Transcript of September 19, 1977, p. 97; e.g.:

> "Mr. Bishop: I object to this line of questioning, He's badgering the witness. He's condescending toward the witness, and I object both as a matter of humanity and as a matter of law."
> "Mr. Dobbs: Well, Your Honor, I will respond that I will try to restrain myself. I am outraged at the testimony that's been given, and I am trying to make a point." Transcript, September 19, 1977, p. 138.

Not only were petitioners' objection not "unwarranted," they were not proper bases for a fee award. There is no specific relationship shown betwen these objections and Aetna's and the Trustee's costs. *Contra, Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977). There is no evidence that the objections were made with the purpose of harassment or delay. Every objection during a hearing causes some delay. What separates the right to object from bad faith

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statements as true and not to pass on the truth or falsity of sworn bias or prejudice.

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conduct is intentional harassment. This alleged misstep, together with others, raises the question whether the bankruptcy judge was really attempting to assess a substantial criminal contempt fine against petitioners without affording them the right to jury trial and whether author Dobbs was attempting to exculpate his own conduct.

[3] Alleged misstep (26) complains of petitioners' alleged failure to abide by pre-trial announcements of the bankruptcy judge as to the scope and limit of the issues and evidence at the 60(b) hearings necessitating a reining in of petitioners. If true, this "misstep" bespeaks contempt. The bankruptcy memo never explains which orders the petitioners ignored. Moreover, it never explains how the scope of the 60(b) hearings was impermissibly expanded. The memo states that the prospect of extended debate between counsel deferred respondents' lawyers from objecting to supposedly irrelevant arguments and evidence. The question of clairvoyance aside, perhaps no objection was forthcoming because the argument and evidence were relevant. Pretermitting the question of relevance alleged misstep 26 is an attempt to protect three lawyers from waiver of objection.

[4] See Footnore 2, *supra*.

[5] Alleged misstep (23) is an *ipse dixit* assertion that "trial improprieties were [not] taking place." The item also faults petitioners for objecting to counsel for Aetna and the Trustee conferring together on strategy during the remanded 60(b) and fee hearings. The bankruptcy judge saw "nothing whatsoever out of the ordinary or unethical for counsel representing clients who have a mutual interest in the outcome of litigation to confer with one another." App. at 125. The trustee does not have a "mutual interest" in the 60(b) hearing with Aetna. The trustee, as representative of all creditors, including petitioners, should have remained neutral in the hearings on newly discovered evidence to consider dispassionately newly discovered evidence for its true value. *See, In re Rehersadres,* 108 Fed. 206, 207 (S.D.N.Y. 1901). But if such conduct is common practice in the Northern District of Georgia petitioners should not be sanctioned for urging purification, nor for their naivete. *Cf. Walker v. Bank of America, supra, n. 1. There is no showing of intent to harass or delay. Contra, Roadway Express, Inc. v. Piper,* ___ U.S. ___, 48 USLW 4836 (1980); *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2nd Cir. 1977). There was no attempt to relate the misstep to respondents' costs. *Id.*

[6] Alleged misstep (25) presumably refers to petitioners' objections to *ex parte* conferences between trustee, Aetna, counsel and the bankruptcy judge and the collusion between trustee and Aetna in resisting the 60(b) motion. The bankruptcy memo does not specify the charges of "slander per se." Perhaps he is referring to charges of *ex parte* conferences to research, edit and type orders and memoranda. If so, the memo overlooks the truth. Counsel for Aetna and the Trustee *admitted* these averments in oral argument before the Court of Appeals on rehearing. These admissions *in judico* are tape recorded and preserved for the use of this Court (Order of June 20, 1980). *See* also *Cornish v. United States,* 299 Fed. 283 (6th Cir. 1924). The facts suggest misconduct. Petitioners' counsel, therefore, had a duty to the bar and the courts to

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For reasons given, the bankruptcy judge's findings of fact exculpating respondents would be equally untrustworthy; for example, he absolves them from "aspersions" cast upon their integrity and competence, No. 25; [7] from "innuendos" that they compromised the interests of the bankruptcy estate, Nos. 23,[8] 24;[9] a "cloud" cast upon their conduct, No. 23;[10] from charges of professional conflict of interest and divulging professional confidences regarding aborted plan to bring suit against International Paper Company, a former client of a predecessor to respondent Freeman & Hawkins, No. 22;[11] from Aetna's lawyer's exhibiting a demeaning manner, a condescending attitude and badgering petitioners' witness in cross-

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protest violations of the Code of Professional Responsibility (DR 1-103(A)); *In re Gopman*, 501 F.2d 262 (5th Cir. 1976). Since counsel was duty bound to bring these ethical violations to the attention of the courts, it cannot be said counsel's primary intent was to harass or delay. In addition, there is no showing of respondents' fees in relation to this alleged misstep. *Contra, Browning Debenture Holders' Committee v. DASA Corp.*, supra. Finally, respondents should not benefit from their misconduct, *In re Kaid*, 347 F. Supp. 540 (E.D. Va. 1972).

[7] See Footnote 6, *supra*.

[8] See Footnote 5, *supra*.

[9] Alleged misstep (24) is a conclusion of law in the bankruptcy memo finding no substantive evidence of conspiracy among the trustee, Aetna and counsel to compromise the interests of the bankruptcy estate and finds evidence of involvement in several past bankruptcy proceedings to be of no probative value. The memo concluded that the inferences of conspiracy to compromise the interests of unsecured creditors were unsubstantiated. The facts adduced March 6, 1978 showed that Aetna's lawyer had handled about 200 no asset cases for this judge. Transcript p. 15. The trustee had handled a "lot of them." Transcript p. 70, 68. Later it was disclosed that Aetna's lawyer and the trustee had worked together on four cases, and on one occasion the trustee acted as an expert witness for Aetna's lawyer on the reasonableness of attorneys' fees. Transcript pp. 70-72. These points were adduced for their cumulative effect upon the question whether the bankruptcy judge's impartiality might reasonably be questioned under 28 U.S.C.A. Sec. 455.

[10] See Footnote 5, *supra*.

[11] Alleged misstep (22) was petitioners' application to remove the Trustee and co-counsel for divulging confidences of International Paper Company revealed to co-counsel in a prior representation. The memorandum stated that petitioners never proved co-counsel was the source of information, and even if co-counsel had divulged it, disqualification was not warranted. The memorandum cited no legal authority. Petitioners' concerns and application were reasonable. The question of attorney disqualification was most recently litigated in *Trone v. Smith*, ___ F.2d ___, 49 U.S.L.W. 2049 (9th Cir., June 23, 1980) where the Ninth Circuit held the relevant test for disqualification was whether the prior representation had a substantial relationship to the current representa-

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examination, No. 19.[12] Indeed, he implies he intervened to prevent any waiver of rights from respondents' failure to object when appropriate, No. 26.[13]

E. Findings of Fact Which are Intellectually Dishonest.

The findings impugned above (that is, Nos. 17, 19, 22, 23, 24, 25, 26) are inherently suspect because they absolve the judge and his gang from all claims of impropriety. Other findings so distorted as to justify a charge of intellectual dishonesty are as follows: No. 3 which chops off a dependent clause from the subject of the sentence without so indicating;[14] No. 8 which totally ignores a Supreme

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tion. If there was a reasonable probability that confidences were revealed in the course of the prior representation that could be used in adversary proceedings in the course of the current representation the substantial relationship is presumed. The test does not require applicant to show confidences were actually divulged. Additionally, the test applies to law firms as well as attorneys. In the instant case co-counsel's firm received confidential information co-counsel was contemplating using against IP. *Trone v. Smith, supra*, requires disqualification. Moreover, petitioners' counsel had a duty to report perceived ethical violations of the Code of Professional Responsibility, DR. 1-102(A), App. 208, *In re Gopman*, 501 F.2d 262 (5th Cir. 1976). Counsel should not be sanctioned for fulfilling his obligation to the State Bar of Georgia and the federal court. The trustee and co-counsel should not benefit from their own unethical conduct, *In re Kaid*, 347 F. Supp. 540 (E.D. Va. 1972).

[12] See Footnote 2, *supra*.

[13] See Footnote 3, *supra*.

[14] Alleged misstep (3) is a rank distortion of petitioners' contention in brief on appeal that the intervention order was sufficiently suggestive to rebut a presumption that the trustee was adequately representing petitioners' interests. The brief states that the district court ruled that the trustee *may be* inadequate; the brief does not claim the district judge found the trustee to be inadequate. No only did the bankruptcy memo misconstrue petitioners' argument but the judge misquotes the district order. The order begins:

> "Since we need not and do not find that the Trustee's representation is inadequate . . . ." (Memorandum, p.9)

as to which the bankruptcy judge substituted a period for a comma after "inadequate" and omitted the rest of the sentence:

> : . . . but only *may* be inadequate, we think that intervention is justified." [Order, p.11, App. 161] [Emphasis added].

This is intellectually dishonest. Finally, the bankruptcy memo reasons post hoc from the district judge's later refusal to remove the trustee that the argument was made incorrectly Memorandum, p. 9, App. 112. *Contra. Christiansburg Garment Co. v. EEOC, supra.*

Court case directly on point and previously cited by the district court requiring the taking of evidence at Section 27 (Act of 1898) settlement hearing;[15] No. 10 which inexcusably states that one type of appeal was filed *after* another when *court* records should show this to be absolutely false;[16] No. 12 which takes a legal argument proffered to support petitioners' view of the facts and applies it

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[15] Alleged misstep (8) is petitioners' assertion on appeal to district court that they were entitled to an evidentiary hearing at the Sec. 27 hearing. Their claim that the bankruptcy judge should have heard evidence is not novel. In *Protective Committee v. Anderson*, 390 U.S. 414 (1967) the Supreme Court held:

> "There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." 390 U.S. 424.
>
> *"To make an informed and independent judgment, however, the court needs facts, not allegations." Id.* at 437. [Emphasis added].

The *quality* of the Sec. 27 fact finding was a matter addressed by the bankruptcy memo. After stating the due process in the Sec. 27 hearing is required the author stated:

> "The *quality and nature of the judicial inquiry* and depth of the consideration given to the rights of the parties, be it *plenary or summary*, is and should be *indistinguishable*." [Memorandum, September 11, 1978 at 8, n. App. at 111.] [Emphasis added].

For the bankruptcy judge to cite "misstep eight" as a frivolous claim is to repudiate his own analysis of three pages earlier. *Cf.* App. 111 *with* 114. See, also, district judge's April 15, 1977 order at App. 65 where the district judge indicates that "arguably" more evidence could have been addressed at the Sec. 27 hearing. There is no finding that the argument was made for an improper motive. *Contra. Roadway Express, Inc. v. Piper, supra; Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980); *Browning Debenture Holders' Committee v. DASA Corp., supra*, n. 6

[16] Alleged misstep (10) is an utter distortion of fact charging petitioners with filing a FRAP 4 notice of appeal *after* the Fifth Circuit had denied a FRAP 6 petition for leave of appeal. A comparison of Fifth Circuit docket sheets for cases No. 78-1501 (FRAP 4) and 78-8040 (FRAP 6) will show that the petition for leave to appeal and the notice of appeal were filed *simultaneously*, a practice suggested in 9 *Moore's Federal Practice*, Par. 206.02 pp. 1205-06. Finding that the appeal was frivolous is refuted by highly inconsistent actions by the bankruptcy judge; to wit: assessing $131.50 costs against appellants in an Order of June 13, 1977 *and on the very same day* entering an order setting the matter down for hearing! The explanation is *ex parte* contact, at least. Moreover, an Art. I judge lacks jurisdiction to vindicate the Fifth Circuit.

to respondents' view of the facts;[17] No. 13 which ignores substantial evidence and again chops off quoted testimony exactly at the spot where confusion is explained (caused by Aetna's lawyer's overbearing manner);[18] Nos. 14, 15 which misstate argument and testimony in briefs in this and related actions.[19] [20]

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[17] Alleged misstep (12) is an example of ripping premise from conclusion and arguing that the conclusion is frivolous. The premise in the relevant 60(b) argument was that the Aetna loan was to Paneling and the bankrupt was a guarantor whose guaranty was unsecured. The conclusion then follows: Aetna's foreclosure on the bankrupt was wrongful because Aetna had no perfected security interest in the property seized and no officer of the bankrupt had board of directors' authority to surrender corporate property to Aetna under those circumstances, especially in light of the fact that the inventory loan which Aetna was purportedly foreclosing on had been paid off by March, 1974.

[18] Alleged misstep (13) is argument to the district court in support of the 60(b) motion that Aetna never made a loan to the bankrupt. The bankruptcy memo initially says there was "overwhelming evidence to the contrary." By contrast, the similarly-prepared 40-page opinion says there was "no evidence." The memo dismisses the argument as "frivolous" but in support negligently miscites the transcript of testimony by William Fredrick Sponsler of IP at the remanded hearing. The bankruptcy memo quotes the transcript through the middle of p. 185 to show that Mr. Sponsler always believed Aetna made its loan to the bankrupt. *The very next but omitted question to Mr. Sponsler demonstrates conclusively that he misunderstood Aetna's lawyer's question. Cf.* bankruptcy judge's miscitation of the district court order in misstep three *with* the miscitation by petitioners of *Palakiko.*

[19] Alleged misstep (14) distorts petitioners' contention regarding newly discovered evidence. They never claimed that Aetna's receipt of fire insurance proceeds was newly discovered evidence. What was newly discovered was evidence that the bankrupt was hurt by Aetna's receipt rather than benefited. The evidence consisted of a constellation of facts that the fire occurred prior to Aetna's fraudulent act of obtaining a purported interest in the equipment proceeds and Roberts' ownership of that equipment and intention to reopen the Forest Park store upon transmission of the insurance proceeds representing the equipment. Contrary to the memo, the precise date of the fire (December 31, 1973) had never been mentioned to petitioners' before they learned it in May 1977. The sworn statement of affairs by T. R. Locke, the bankrupt's president, puts the fire on January 19, 1974 as does his deposition of September 10, 1974, at 40. Quinault's president, Johnson, calling from a location outside Seattle, Washington, had no telephone contact with the bankrupt from December 26, 1973 to late January 1974. See depo. A. R. Johnson, Vol. I, December 15, 1976 and defendant's Exhibit 5 marked at p. 48, identified at 40 and testimony at pp. 48-50, 102. Therefore, even if the fact of a fire were mentioned, whether it occurred December 31 or January 19 would not have been memorable because Paneling would not have informed him, a supplier, of the internal documentation of the Paneling loan. Besides, evidence, newly discov-

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F. Findings of Fact Which Distort Argument

Other examples of distortion not discussed above are as follows: No. 21 which conceals the fact that the bankruptcy judge's March 29, 1978 letter to petitioners' counsel was received Friday afternoon March 31, necessitating counsel notifying five clients that the judge had granted them permission to testify Wednesday, April 5, but their counsel did not receive advices of attendance until Monday afternoon, April 3rd, leaving less than the two days for written notice;[21] No. 11 which takes an incidental observation of evidence in an initial motion brief as a major argument urged upon the courts;[22] No. 1 which ignores the

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ered, must have been reasonable since the district judge remanded for an evidentiary hearing.

[20] Alleged misstep (15) faults petitioners for arguing that Aetna wrongfully withheld fire insurance proceeds from Roberts.
The bankruptcy memo found no harm to the bankrupt in Aetna's retaining the proceeds and stated that the claim lacked support. The transcript of the Sepember 19, 1977 remanded hearing shows Roberts was prepared to testify but the bankruptcy judge adjourned without giving petitioners the opportunity to call Roberts. Transcript, September 19, 1977, p. 169. The harm to the bankrupt from Aetna's retaining the proceeds is obvious. If Roberts would have used the proceeds to buy new equipment and reopen a cash-generating retail outlet, the bankrupt would have been able to obtain much needed cash flow and survive.

[21] Alleged misstep (21) was petitioners' calling four witnesses at a fee hearing whose name had not been provided in writing to Aetna and Trustee's counsel two days in advance. Petitioners' counsel did not receive confirmation from his witnesses until two days before the hearing; it was too late to give two days' written notice. Two days' oral notice was given, however. The memo does not explain how Aetna and the Trustee were prejudiced by receiving oral notice in lieu of written. If Aetna and the Trustee were prejudiced, the bankruptcy judge should have simply refused to allow the witnesses to testify rather than assess a fee. There is no showing that oral notice was given for the primary purpose of delay or harassment. *Contra, Roadway Express, Inc. v. Piper, supra,* n 6. This item has no relation to the assessment of fees; Aetna and the Trustee never showed how receiving oral notice caused expenses greater than those that would have accrued under written notice. *Contra, Browning Debenture Holders' Committee v. DASA Corp., supra,* n 6. If the gravamen of the complaint is the "affront" to the Court rather than prejudice to Aetna and the Trustee, the "misstep" suggests criminal contempt for which a jury trial should have been afforded.

[22] Alleged misstep (11) is a distortion that makes a principal contention out of a mere observation in a long 60(b) motion filed May 31, 1977 as the one year period was expiring, to wit: no Aetna officer could remember any authorization for Mr. McGee to sign a security agreement for Aetna.

existence of the trustee's plenary action in another court in which an order had been entered prohibiting settlement until that court ruled on an intervention order;[22A] No. 2 which transforms a "suggest[ion]" into an argument;[22B] and No. 16 which claims petitioners' act, despite the emergency created by respondents' misconduct, was the assertion of another party's brief as their own.[23]

[22A] Alleged misstep (1) is a distortion of one of petitioners' 26 arguments on appeal from the settlement order to the district court that the bankruptcy judge lacked jurisdiction to approve *all* settlement issues including the trustee's plenary action. The bankruptcy memo labeled this "clearly wrong." However, the district judge had already ruled that the trustee could not settle the plenary action with Aetna until he ruled on the corporate petitioners' motion to intervene in that lawsuit. Order, Sept. 30, 1976, App. at 152. Fed.R.Civ.P. 41 requires district court approval to dismiss by reason of settlement or otherwise. In addition, there was no finding that the argument was made in bad faith. *Contra, Roadway Express, Inc. v. Piper,* ___ U.S. ___, 48 U.S.L.W. 4836 (1980); *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2d Cir. 1977); *Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir. 1980).

[22B] Alleged misstep (2) is a distortion of petitioners' *suggestion* in the brief on appeal that a district judge interpret another district court order allowing intervention (Sepbember 30, 1976) as res judicata (meaning collateral estoppel) on whether a $350 settlement of a $263,000 voidable preference claim was adequate. The intervention order suggests that the settlement price influenced the grant of the intervention order: *". . . the trustee presented a proposed settlement . . . whereby the action would be dismissed for a mere $350.00."* Order September 30, 1976, App. at 155. (italics supplied.) The bankruptcy memo relies on the district judge's later affirmance of the settlement to conclude that petitioners had "misrepresented" the intervention Order. App. 111. Such post hoc reasoning is inappropriate. *Christianburg Garment Co. v. EEOC,* 434 U.S. 412 (1978). Additionally, there is no evidence or analysis that petitioners did not, in good faith, interpret the order correctly. *Contra. Roadway Express, Inc. v. Piper, supra,* n. 22A, *Browning Debenture Holders' Committee v. DASA Corp., supra,* n. 22A. Besides it is a district judge's business to interpret the holdings of other district courts. He should not base substantial judicial action on any lawyer's word about the holding of a case.

[23] Alleged misstep (16) is a filing in district court in response to the trustee's assertion that petitioners' documented arguments were "tantamount to a fraud on the court." Trustee's brief filed June, 1977 at p. 22-23. Petitioners' unusual procedure is satisfactorily explained by the time constraints imposed by the trustee's and Aetna's wilful delay in producing documents within scope of proper discovery, prohibiting more leisurely analysis of the trustee's contentions. The district judge, in whose court the brief was filed, and who considered it in determining to grant petitioners an evidentiary hearing, made no criticism of petitioners' efforts in desperation.

G. **Other Findings of Fact.**

Five (Nos. 4, 5, 6, 7, 20) of the remaining seven alleged missteps concern a typographical error in a brief filed in another court, No. 4;[24] a miscitation of a case in the same brief, No. 7;[25] the semantic meaning of a two-word expression, No. 6;[26] the proper interpretation of the intervention order by another court, No. 5; [27] an absolute non-event

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[24] Alleged misstep (4) is trivia and caused absolutely no damage to respondents; the bankruptcy memo says that petitioners stated in their brief on appeal that Aetna never raised as a defense the trustee's standing to charge Aetna with fraud. A close reading of page 23 of the brief makes it apparent that the substitution of "was not raised" for "was raised" was a typographical error. *Cf.* two statements on the same page: "The issue . . . was not [sic] raised. . . . " *with* "The bankruptcy judge erred as a matter of law in concluding that the trustee did not have standing to maintain an action for fraud." Failure to catch a typographical error is not the type of conduct federal courts have based fee awards upon. *Cf. Instituto Per Lo Sviluppo Eonomico Dell 'Italia Meridionale v. Sperti Products, Inc.*, 323 F. Supp. 630 (S.D.N.Y. 1971).

[25] Alleged misstep (7) is the petitioners' miscitation of *Palakiko v. Territory of Hawaii*, 188 F.2d 54 (9th Cir. 1951) in the brief on appeal to the district court. The bankruptcy judge seemingly absolves petitioners from bad faith, vexatiousness or wanton conduct:

> "Appellants' counsel confessed that he had not read the case and that the fault, *if any*, was that of his 'law clerk'." (Memorandum, App. 113) (Emphasis added).

Certainly, in absence of a finding that *Palakiko* was cited purposefully to mislead (itself a contradition since judges do not take substantial judicial action upon a cited case in a brief without reading it) fees should not be predicated upon miscitation of one case in proceedings where hundreds of cases (must we count the cases to avoid a bad faith charge?) have been cited. *Roadway Express, Inc. v. Piper, supra*, n. 22A, *Nemeroff v. Abelson, supra*, n. 22A. *Cf.* the bankruptcy judge's own miscitation of the district judge's intervention order discussed in regard to misstep three. (For explanation of the law clerk's reasoning, see Brief of Appellant, Court of Appeals, at p. 33.)

[26] Alleged misstep (6) is trivia. The bankruptcy memo finds fault with petitioners for stating in their appellate reply brief that the "unanimous expression" of unsecured creditors was dissatisfaction with the trustee. Since all unsecured creditors who expressed a view expressed dissatisfaction, the view was unanimous. *Roberts Rules of Order* (Newly Revised Ed., 1970), pp. 344-5; *Sturgis, Standard Code of Parlimentary Procedure* (2d Ed.), p. 35; *State v. Stephans*, 195 Mo. App. 34, 189 S.W. 630; *Commonwealth ex rel. Matthews v. Ford*, 444 S.W.2d 908 (Ky. Ct. App. 1969).

[27] Alleged misstep (5) was the legal argument that the district judge in the intervention order of September 30, 1976 indicated that intervenors could litigate claims usually assertable only by a trustee. The order

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without significance to those petitioners which were unable to transverse the continent to testify because those which testified were likewise held liable for the full amount requested, No. 20.[28] The remaining two findings of fact (No. 9 and 18) are discussed under the following argument heading.

VIII. FEE AWARD WAS UNJUST

A. **American Rule.**

In the absence of statutory provision attorneys' fees are not available as costs to the prevailing party. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This principle of *Arcambel v. Wiseman*, 3 Dall. 306 (1796), has survived because of policy reasons against fee awards:

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may fairly be construed to allow petitioner to assert derivative causes of action against Aetna:

> "The putative intervenors are unsecured creditors of the bankrupt, Georgia Paneling Supply Company[sic], and claim an interest in the property which is the subject matter of the trustee's action to set aside the alleged voidable transfer and voidable preference to defendants herein. In addition to their derivative claims, they also assert individual claims against the defendants . . . [Order at 3, App. 154.]
>
> "We agree with [Wright and Miller's] comments in this respect. In the first instance, movants have demonstrated a real interest in the instant litigation, albeit derivative and somewhat contigent, further, they seek to assert individual claims." [Order at 8, App. 158.]

After recognizing the nature of petitioners' claims the district judge entered an order granting intervention. The order in no way limited the issues assertable by the intervenors to individual claims. A reasonable attorney could have concluded the district judge was allowing his clients to assert the trustee's claims because he might be inadequate. Since the claim was reasonable it was not bad faith. *Nemeroff v. Abelson, supra*, n. 22A. There is no finding of fact whatsoever that the argument was made for improper purposes. *Contra. Roadway Express, Inc. v. Piper, supra*, n. 22A, *Nemeroff v. Abelson, supra*, n. 22A, *Browning Debenture Holders' Committee v. DASA Corp, supra*, n. 22A.

[28] Alleged misstep (20) is a trivia. The bankruptcy memo cites as a basis for a fee award that only three of the five petitioners testified at the fee hearings after the judge set down two dates. Bad faith, vexatiousness or wanton conduct does not appear on the face of these facts and the bankruptcy memo never offered any analysis. *Contra, Roadway Express, Inc. v. Piper, supra*, n. 22A. There is no showing of a relationship between respondents' costs and this misstep. *Contra, Browning Debenture Holders' Committee v. DASA Corp., supra*, n. 22A.

(1) the chilling effect on exercise of rights, especially affecting the poor;

(2) the difficulties of proof inherent in litigating the question of what fee is reasonable; and

(3) the "threat to independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues." *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 at 129 (1974).

B. Exception: Wilful Disobedience of a Court Order.

Alyeska recognizes an exception for wilful disobedience of a court order. 421 U.S. at 258. However, disobedience must be stubborn with substantial adverse effects, *Hutto v. Finney*, 437 U.S. 678 (1978), rather than passive, *Societe Internationale v. Roberts*, 357 U.S. 197 (1958).

The bankruptcy memo makes no allegation of wilful disobedience of a court Order. The memo observes there was "refusal . . . to abide by pre-trial announcements of the Court . . ." and "continued [examination of] witnesses . . . despite rulings of the Court." No. 26. While there were some objections, which "brought lengthy exchanges from counsel for [petitioners]," respondents "refrained from making appropriate repeated objections." Taking this on *face* value, it would be logical to say that respondents refrained because petitioners' "lengthy exchanges" convinced them that petitioners' issues were not irrelevant. Obviously, the judge was silent too since he remarks that he had to cut in when respondents failed to object. Truly, if petitioners' "refusal" was serious the judge would either have warned of contemptuous conduct or adjudicated a contempt. In fact, the word contempt was not used.

C. Exception: Bad Faith.

Federal courts in the exercise of an equity jurisdiction have fashioned an exception to the American rule allowing the prevailing party to recoup his attorneys' fees when the adversary has been guilty of bad faith, wanton, vexatious or oppressive conduct. *Alyeska Pipeline Service Co. v. Wilderness Society, supra*. Bad faith conduct may be found in the instigation of the lawsuit or the manner in which it is prosecuted, or both. *Roadway Express, Inc. v. Piper*, ___ U.S. ___, 48 U.S.L.W. 4836 (1980). Attorneys' fees may be assessed under the bad faith exception against litigants or counsel. *Id.*

Bad faith in bringing suit is filing a claim "entirely without color and . . . asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 at 1088 (2d Cir. 1977). The Second Circuit in *Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir. 1980) held a colorable claim to be when a reasonable attorney would conclude that facts sufficient to support the claim might be established. If the suit has color the motive behind its filing is not considered. *Id.; Browning Debenture Holders' Committee v. DASA Corp., supra.*

Three other rules apply: One, a court is not to engage in "post hoc reasoning", *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 at 421-22 (1978). Two. "[a]n award . . . should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves," *Browning Debenture Holders' Committee v. DASA Corp., supra* at 1088, i.e. there must be proximate causation. Three, double or duplicate awards are prohibited, *In re First Colonial Corp. of America,* 544 F.2d 1291 (5th Cir. 1977). All three rules were broken, repeatedly, by the judge and respondents.

D. Non-Exception: Mere Negligence or Naivete.

A footnote (n13) in *Roadway Express, Inc. v. Piper,* ___ U.S. ___, 48 USLW 4836 at 4840 (n.13)(1980) indicates that an intermediate New York appeals court (*Moran v. Rynar,* 39 App. Div. 2d 718, 332 N.Y.S. 2d 138 (1972) cited *Schwarz v. United States,* 384 F.2d 833 (2d Cir. 1967) with approbation, the inference being that Second Circuit dictum (sustantial costs and fees should be imposed for inexcusable neglect) is consistent with or a support for New York practice holding attorneys liable to opposing counsel for mere negligence. In truth the New York appellate division was citing a New York law professor's note to a provision of the CPLR, and *the court omitted reference to Schwarz.* Presumii g intelligence on all sides, Professor Siegel cited *Schwarz* for the source of quotations used, not the observation made. *Uniform Sysem of Citation* (12th Ed. 1976), p. 6. Siegel's observation was not the holding of *Schwarz*; footnote 13 indicates the Supreme Court recognized that *Schwarz* did not refer to any "preference."

There are some Second Circuit cases without the ex-

treme language of *Schwarz* that approach Siegel's interpretation, *e.g., Bardin v. Mondon*, 298 F.2d 235 (1961).

In sum, the *Schwarz* dictum is far beyond the ken of the New York rule, which developed out of peculiar New York policy. The New York cases sought to resolve the dilemma of a litigant whose apparently meritorious claim has been dismissed because of his attorney's negligent failure to comply with statutory procedural rules. New York courts have protected innocent litigants from their counsel's negligence by allowing judicial process to continue and charging counsel with opposing party's attorneys' fees necessitated by counsel's negligence.The amounts have been low, e.g., $250 in *Moran v. Rynar, supra,* and *Kahn v. Stamp*, 52 App. Div. 2d 748, 382 N.Y.S. 2d 199 (1976). In fact, a close reading of the New York cases reveals that they rely not so much on inherent power but concepts of fairness and statutory interpretation of CLPR 3216 in order to give effect to strong public policy to give every litigant his day in court. New York holds procedural rules to be non-jurisdictional. Other commentary of Civil Practice Law and Rule 3216 (McKinney) by Professor Siegel cited in *Moran v. Rynar, supra*, suggests such was the reasoning of the New York courts.

E. Plenary Action: Lack of Proximate Causation and Bad Faith Findings

Notwithstanding the total absence of findings of fact in the September 11, 1978, Memorandum regarding any alleged missteps in the plenary action, the bankruptcy judge awarded a total of $8,980 as follows: $8,000.00 to Freeman & Hawkins and at least $980.00 to the trustee. In the November 14, 1978, Memorandum the bankruptcy court justified this award as consequential damages. This was impermissible. *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1978). Awarding two attorneys' fees to the trustee and his co-counsel for their participation in the plenary action was error. *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977). Besides, the proper forum is a district court after the plenary action is terminated because it retains such equitable jurisdiction, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). Cf. Local Rule 351.1 (ND Ga.)

F. Fee Applications: Unconstitutional Burden on Right to Defend

Respondents' motions for fee award were noticed to be heard concurrently with the remanded 60(b) motion. An order denying Rule 60(b) relief and an opinion were entered, December 20, 1977 and January 5, 1978. respectively. After appeal was taken to district court, the bankruptcy judge proceeded with the continued hearing on the fee applications. Between the first and second hearing dates petitioners obtained written proof of serious improprieties by clerical error. Since the order and opinion had been drafted by respondents, petitioners thought it relevant whether their alleged bad faith was the product of federal power or Aetna and the trustee acting collusively. "A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg Garment Co. v. EEOC* 434 U.S. at 419 (1978). Therefore, an award based on petitioners' defending themselves from an assessment of attorneys' fees was unreasonable and an unconstitutional burden on Fifth Amendment Due Process. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980), *pet. for cert. pending* (No. 79-1522).

Notwithstanding the reasonableness of petitioners' defending themselves from motions for attorneys' fees, and *saving untold* hours of the court's time by stipulating the hours spent by Freeman & Hawkins and allocating them among the various procedural motions (which good faith the judge does not acknowledge), the bankruptcy judge awarded fees against petitioners in amount of $3,070.65 as follows: $1,975.00 to Freeman & Hawkins, at least $275.00 to the trustee, and $820.65 to Aetna. The bankruptcy judge mentions three alleged missteps in order to justify this imposition, Nos. 20, 24, 25.[29]

G. Appeal: Reasonable Prosecution From "[M]ere $350.00" Settlement Order

Petitioners argued on appeal that the bankruptcy judge should have granted an evidentiary hearing (which the bankruptcy judge curtailed before presentation of evidence on the remanded 60(b)(2) and (3) motion), a right to which petitioners were entitled. *Protective Committee v. Anderson*, 390 U.S. 414 at 424 (1968). Petitioners contended that the bankruptcy judge should defer to the district judge

before whom the trustee's plenary action was pending (and in which petitioners would have a right to jury trial if the motion to intervene was granted — and it was ultimately granted and jury trial was demanded) because the *key issue* in the plenary action and the bankruptcy proceeding was whether Aetna should be estopped from setting up its perfected security interest for bad faith. *Central Soya Co., Inc. v. Bundrick,* 137 Ga. App. 63, 222 SE2d 852 (1975). A jury trial in and for a bankruptcy proceeding is not unknown. *See J. Moore's Federal Practice,* Vol. 5, par.38.30[3] at 223 and par. 38.30 [2] at 220. On the subject of deferral, compare *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.* 333 U.S. 103 (1948).

To the trustee's argument that he lacked standing to sue, petitioners cited *Henderson v. Rounds and Porter Lumber Co.*, 99 F. Supp. 376 (W.D. Ark. 1951) and repondents cited *Cissel v American Home Assurance Co.*, 521 F.2d 790 (6th Cir.1975). *Colliers on Bankruptcy,* Vol 4A par. 70.29 [3] at p. 435, indicates there is authority on both sides of the standing issue.

After reassignment by one district judge to another, the subject district judge affirmed April 15, 1977. As result of discovery commenced the previous year, petitioners' motion to compel Aetna to produce documents and threats to seek sanctions under Fed.R.Civ.P. 37 (*Roadway Express, Inc. v. Piper,* ___ U.S. ___, 48 USLW 4836 (1980)), petitioner's active discovery uncovered by May 16, 1977 misrepresentations and misconduct of Aetna and its counsel to the courts and to petitioner.

Petitioners were in a quandary.[30] They wanted the district judge to vacate his April 15th affirmance based on the new evidence or at least to rule on the new evidence; they did not want to go through further proceedings. Petitioners resolved the "Catch 22" dilemma (as perceived by the district judge's Order June 15, 1977) and moved to extend time to appeal from May 16 to June 15 on the theory that if granted the district judge would have the time and power to correct its own judgment. *See Sommer Corp. v. Panama Canal Co.*, 475 F.2d 292 (5th Cir.1973); *Markham v. Holt,* 369 F.2d 940 (5th Cir. 1966); *Cf. Oliver v. Home*

[29] See footnotes No. 28, 9, 6.

[30] August 1, 1979 amendment to FRAP 4(a)(5) has added "good cause" to "excusable neglect" as reason for extending time to appeal.

Indemnity Co., 470 F.2d 329 (5th Cir. 1972), affirming *Oliver v. Monsanto Co.*, 56 F.R.D. 370 (S.D. Tex. 1972); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 938 (5th Cir. 1976). But because the district judge did not act, and with the one year deadline for 60(b) (2) and (3) motion expiring June 17, 1977, they filed the 60(b) motion May 31, 1977.

Notwithstanding the reasons for petitioners to appeal from the bankruptcy settlement order, that court awarded $7,229.00 attorneys' fees to respondents as follows: $5,284.00 to Freeman & Hawkins, at least $530.00 to the trustee and $1,415.00 to Aetna. In the findings of fact which the district judge did not have at the time he affirmed the fee award, petitioners are alleged to have engaged in nine missteps and they all concern appellate briefs to the district court. Petitioners say the district court had exclusive jurisdiction to determine costs and fees. Cf. Local Rule 350. Three of the alleged missteps concerned interpretation of the district judge's September 30, 1976 order which allowed intervention in the plenary action, Nos. 2, 2, 5. Three concern semantics, No. 1, 2, 5. Another concerns one cited case out of hundreds cited, No. 7[31]. One involves a typographical error, No. 4[32]. One pertains to the motion for extension of time to appeal to the court of appeals, No. 9[33]. The bankruptcy memo does not hint at bad faith in five (Nos. 1, 2, 4, 5, 7[34]) of the nine (Nos. 3, 6, 8, 9[35]) alleged missteps.

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[31] See footnote No. 25.

[32] See footnote No. 24.

[33] Alleged misstep (9) was petitioners' motion to the district judge for an extension of time to file notice of appeal to the court of appeals in respect of an affirmance of the settlement order. Petitioners filed the motion because of the pressure of time and newly discovered evidence. Their belief was that if time to file notice of appeal was enlarged the district judge would have time to set aside his affirmance order because of newly discovered evidence and an appeal would be obviated. *See Sommer Corp. v. Panama Canal Co.* 475 F.2d 292 (5th Cir. 1973). The one year deadline to file a 60(b) motion to set aside the June 17, 1976 settlement order was rapidly approaching. The reasonableness of seeking enlargement of time to file notice of appeal is evident from the 1979 amendment to FRAP 4(a) (5) which allows enlargement for good cause. *See*, Advisory Committee notes to 1979 Amendment to FRAP 4(a) criticizing the old rule as inappropriate when the time to appeal has not expired. Missetp nine also claims the 60(b) motion to have been "frivolous". This would appear to be akin to a violation of law of the case, since the district court remanded it for an evidentiary hearing.

[34] See footnote No. 25.

[35] See footnote No. 33.

H. Fed.R.Civ.P. 60(b) Motion.

1. *Emergency Circumstances in Which Filed.*

The bankruptcy judge signed what petitioners now believe to be an Aetna-prepared order approving the settlement, June 17, 1976. In response to petitioners' request for production of documents in the plenary action, Aetna wrote in December, 1976 that any documents pertaining to Paneling, Forest Park and other affiliates were irrelevant to intervenors' first amended complaint charging Aetna with fraud, conversion and other misconduct sufficient to erect an estoppel to set up its perfected security interest against them as unsecured creditors. Although Aetna's depositions of petitioners were conducted by agreement of counsel, Aetna refused to produce any documents other than certain loan documents, whatever. Petitioners filed a motion to compel production. At a chambers conference with the district judge, April 25, 1977, Aetna promised to furnish documents, but Aetna did not. Finally, on April 27, 1977 Aetna produced a few documents; some intentionally withheld were not delivered until later May, 1977.

Depositions of Aetna vice president, C. R. White, on May 3, 4, 1977 produced the admission that "just one loan" was made, to Paneling, a sister corporation to the bankrupt. To petitioners this made manifest that Aetna had not a valid interest in the fire insurance proceeds. A depositon of a disgruntled former Aetna vice president was scheduled in North Carolina for June 15, 16, 1977.

The one year ultimate deadline for 60(b) (2), (3) relief, June 17, 1977, was expiring. Petitioners were concerned with the "reasonable" time deadline under 60(b) which can elapse within one year. Depositions had to be transcribed. The formerly concealed books and records of Paneling had to be analyzed. With less than a month to go, petitioners had to receive, analyze, and sort out evidence of respondents' fraud and misconduct and prepare a 60(b) motion which would stand up under respondents' anticipated assault. Not only did respondents' acts cause the emergency but they caused petitioners to act precipitously to save the 60(b) motion. In this circumstance, alleged missteps Nos. 9, 11, 12[36] and particularly 16[37] can be justified, if they have any merit. *Cf. Lichtenstein v. Lichtenstein*, 481 F.2d 682 (3rd Cir.) *cert. denied*, 414 U.S. 1144 (1973).

[36] See nootnotes No. 33, 22, 17.

[37] See footnote No. 23.

2. *60(b) Motion Was Colorable When Filed.*

The court of appeals found the 60(b)(2) evidence to be "conflicting." 581 F.2d at 521. Aetna agreed. Brief of Appellee, July, 1979, at pp. 14, 15. The district judge found the 60(b) motion and the four amendments (with affidavits attached) merited remand to bankruptcy court for an evidentiary hearing. Order August 26, 1977. Finally, the court of appeals ruled that appeal of a twice-denied 60(b) motion was not frivolous. 616 F.2d 893. Plainly, the 60(b) motion was colorable under *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980) and *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1978). The bankruptcy memo's intentional distortion of petitioners' evidence (Nos. 11, 12, 13, 14, 15[38]) cannot stand.

3. *60(b) Motion Was Prosecuted in Good Faith.*

Bad faith conduct in the prosecution of a claim is defined as (a) not terminating a claim when sufficient facts become available to demonstrate the claim is not longer colorable, or (b) engaging in intentional dilatoriness. *Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir. 1980).

The bankruptcy memo made no findings whatever that the 60(b) motion *became* frivolous; it asserted the motion was "frivolous" from its inception. Instead the memo finds petitioners' to have engaged in dilatory conduct. However, *Roadway Express, Inc. v. Piper*, ___U.S. ___, 48 USLW 4836 (1980), requires a specific finding of *wilful* abuse of judicial process. By contrast, the memo merely finds negligent or naive abuse of judicial process. There is *no evidence cited* of intent to delay or harass respondents: At most there are *conclusions* of law possibly suggesting same. This is insufficient as a matter of law.

Alleged misstep (9)[39] implies naive misuse of process in filing the 60(b) motion. However, in reciting the manner in which done, the court of appeals (second panel) did not criticize petitioners, to wit:

> "'Appellants' first petition for relief under Rule 60(b) was made to the district court and included a request for relief under Rule 60(b)(6). That court denied relief. Upon petition for reconsideration, the district court remanded to the bankruptcy court for a rehearing on

[38] See footnotes No. 22, 17, 18, 19, 20.

claims under Rule 60(b) (1), (2), and (3).***" 607 F.2d at 118.

Appellees did not file a cross-notice of appeal as to this action of the district judge.

With respect to the form of one of the amendments to petitioners' 60(b) motion (No.16[40]), its form was justified by the trustee's charge that the 60(b) motion was "tantamount to the perpetration of a fraud on the court" in a brief filed June 10, 1977 on the eve of the expiration of the one-year limitation to file the 60(b) motion, June 17, 1977.

With respect to petitioners' charges of misconduct and appearance of impropriety, the Fifth Circuit has indicated, in petitioners' opinion, that there was misconduct but it was nonprejudicial, to wit:

> "We find that the charges [under 60(b)(3)] are either unsupported by the record *or concern actions which did not prejudice appellants.*" 607 F.2d at 118 [Emphasis added].

Thus alleged missteps Nos. 19, 23, 25 and 26[41] are bogus. The misconduct *prompted* the request in No. 18[42]; *In re Primus*, ___ U.S. ___, 56 L. Ed.2d 417 (1978) suggests the effort proper.

The remaining charge, No. 17[43] deals with proceedings before the bankruptcy judge, September 13, to 20, 1977. The jury trial petitioners' counsel was scheduled to conduct September 19 was a legitimate basis for a continuance. The motion to reassign to another bankruptcy judge was prescient as the bankruptcy judge was engaging in *ex parte* conferences; and even if this court should ultimately rule them legitimate, a litigant before such a judge should not be foreclosed from seeking another tribunal.

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[39] See footnote No. 33.

[40] See footnote No. 23.

[41] See footnotes No. 2, 5, 6 and 3.

[42] Alleged misstep (18) criticized petitioners' counsel's effort to assist the trustee in the plenary action against Aetna. The bankruptcy memo overlooks the fact that the trustee and trustee's co-counsel had previously enlisted petitioners' assistance in preparing the trustee's complaint in the plenary action. Because of previous association the labeling of petitioners' request as "solicitation" is unfounded. Inasmuch as the district judge had ruled that the trustee *might* be inadequate to represent petitioners' interest the offer by one lawyer to another was not made in bad faith. There is no showing of harm to the trustee or Aetna. Since this argument did not cause respondents to spend any money, misstep 18 cannot be a basis for attorneys' fees.

[43] See footnote No. 1.

I. Respondents' Unclean Hands Bar Exercise of Equity Power to Make Fee Award.

1. *Respondents* Are "Complainants" or "Counterclaimants"*

*(Respondent trustee's co-counsel made no independent motion for a fee award; rather time records and affidavits were filed by it to support the trustee's motion; petitioners made it a party because the bankruptcy judge awarded it a huge fee award. As herein used "respondents" means movants for fee awards.)

Respondents moved the bankruptcy judge to award attorneys' fees for petitioner's *appeal* to district court after the appeal had long been concluded. As such, respondents were "complainants." Petitioners filed the *60(b) motion* and respondents sought fee awards before the 60(b) motion was determined, much like "counterclaimants." Neither respondent specifically asked for fee awards for participation in the *plenary action*, but the trustee and co-counsel filed time records including time therefor and the judge awarded them fees later justified as consequential damages. Here too, respondents were "complainants." Aetna moved for an award in connection with the fee appliciaton itself, the trustee did not. The judge awarded fee to them both for the fee application. Clearly, they were "complaints."

2. *Bankruptcy Court is Court of Equity.*

The "bad faith" exception to the "American Rule" is a manifestation of the equity power of federal courts. *Hall v. Cole*, 412 U.S. 1 (1973); *see* also *Sprague v. Taconic National Bank*, 307 U.S. 161 (1939). Traditional equity power cannot be evoked if the party seeking equitable relief has "unclean hands."

3. *Doctrine of Unclean Hands in Federal Court.*

This Court defined the doctrine in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945):

> "Thus, while 'equity does not demand that its suitors shall have blameless lives', [cite] as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in

> issue." 324 U.S. at 814-15. "Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions." 324 U.S. at 815.

Even where the courts find the losing party acted in bad faith, federal courts have refused to award the prevailing party its attorneys' fees when the prevailing party's conduct as to the controversy was not totally above reproach. In *Lee National Corp. v. Kansas City Southern Industries, Inc.*, 50 F.R.D. 412 (S.D.N.Y. 1970), Kansas City Southern filed an interpleader in the Western District of Missouri in response to shareholder demands that dividend issue. Lee National, a shareholder, subsequently filed an action in the Southern Disrict of New York to compel a dividend. The Southern District of New York granted summary judgment for Lee National. On Lee National's fee application the Southern District of New York found Kansas City Southern's interpleader to be vexatious. However, the Court refused the fee award because of Lee National's conduct. The court stated that Lee National could have litigated the matter in Missouri in connection with the interpleader but instead chose to file suit in New York. Admitting Lee National was perfectly within its rights in filing suit in New York, the court ruled that because they had multiplied the forums equity would not intervene to afford affirmative relief.

In *In re Kaid*, 347 F. Supp. 540 (E.D. Va.1972), the debtor was adjudicated a bankrupt and his debts discharged. Thereafter Sears brought suit on a conditional sales contract entered into before the petition was filed and won a state court judgment. The debtor then petitioned to reopen bankruptcy proceedings to declare the state court judgment void and to hold Sears in contempt of the original bankruptcy order. Finding Sears in contempt, the district judge denied debtor's application for attorneys' fees. The judge found the debtor to have wilfully converted the property; thus, the bankrupt's unclean hands barred an award of attorney's fees.

In Lee National and In re Kaid the fee applicant received a valid judgment and the losing party was found to have acted in bad faith. Yet, because applicants' hands were unclean their applications were denied.

IX. FEE AWARD WAS CIRCUMVENTION OF LIMITED CONTEMPT POWER VESTED IN REFEREE, OUTSIDE SCOPE OF ANY INHERENT EQUITABLE POWER OF REFEREE; AND WAS VIOLATION OF ART. III

A. Nature of Contempt: Criminal; Civil.

> "Contempts are usually divided into two classes, civil and criminal. As to operative facts, however, the classes are neither mutually exclusive nor inclusive, and the contemptous act may partake of the characteristics of both civil and criminal contempt. Thus the violation of a single order . . . or process of court may give rise to both civil and criminal contempt proceedings. A 'contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainants, and is not intended as a deterrent to offenses against the public.' *The criminal contempt power,* on the other hand, is *punitive in nature* and used *to vindicate the authority of the court* and *to prevent like-minded individuals from emulating the conduct of the contemnor.*" [Emphasis added.]

5 *J.Moore's Federal Practice* (2nd Ed. 1979) Par. 38.33 [1] p.256 at 257-58.

B. Nature of Referee's Findings in Memorandum of September 11, 1978.

At no point in any of the bankruptcy proceedings, from and after the filing of the involuntary petition on June 24, 1974, had the bankruptcy judge adjudged petitioners to be in contempt in Court, or warned petitioners that their conduct was or bordered on the contemptous. Curiously, Aetna's September 11, 1978 memorandum for the bankruptcy judge indicates that: —

1. *Fee Award is Punitive*

The memorandum indicates that the court is "punish[ing]" petitioners [p. 35], exercising power "to impose monetary sanctions" against petitioners [p. 28] and to "discipline[ ]" the attorney [p. 30].

2. *Fee Award is Intended to Deter Like-Minded Litigants*

The memorandum states in a summary paragraph at the end of an enumeration of 26 alleged missteps:

> "The *assessement* will not discourage appeals having a semblance of merit and some legal basis; although the Court recognizes that it *may discourage appeals which are frivolous*, sham, bad faith, vexatious and dilatory." [Emphasis added] [p. 35].

The purpose is, then, to deter.

3. *Fee Award Allegedly Vindicates Authority and Integrity of Court.*

The memorandum indicates that the Court's authority has been impuged in two respects:

> "(25) Appellants have consistently and gratuitously during these proceedings *cast aspersions upon the integrity* and competence of counsel, parties, *non-parties [the Bankruptcy Judge?]* and former counsel to parties. Such remarks have *bordered on being slanderous, if not indeed slander per se. . . .*" *[Emphasis added.] [p. 26, see p. 27].*

> "(26) * * * *Counsel for Appellants displayed open hostility and hard feelings,* far beyond the traditional adversarial bent, bias and vigor, *to* opposing parties, their counsel, *the Court,* and occasionally the District Court." [Emphasis added.] [p. 26].

The memorandum also indicates that the authority of the referee's no-asset trustee, who holds an office under the Act of 1898, was impugned. [See pp. 25-26]. The fee award would appear, therefore, to be tantamount to a criminal contempt of court as which the referee imposed a $36,000 "fine."

C. Referee's Limited Contempt Power.

By contrast to the referee's award of $23,745 to respondent Freeman & Hawkins $7,440 to respondent trustee and $5,146.30 to respondent Aetna, for a total of $36,331.50, Bankruptcy Rule of Procedure 920 confers on the referee power to impose a fine of a mere *$250!* The courts are bulwarks against allowing a different substantive outcome to be produced by a mere change of form. The Supreme Court should grant certiorari to curb a gross abuse by an Art. I officer of the Art. III inherent contempt power reposed in Art. III courts.

D. **District Judge's Limited Ad Hoc Review.**

The district judge accorded a presumption of correctness to the referee's findings of fact by utilizing the "clearly erroneous" standard of review. Bankruptcy Rule 810. The district judge did not find an abuse of power in the referee's $36,000 fee award. The district judge, therefore, did not act *de novo* on a *de facto* criminal contempt as required by Bankruptcy Rule 920, nor did he exercise the supervisory power over the referee as contemplated by bankruptcy law.

E. Violation of Art. III.

Art. III, Section 1, states that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish. *Judges* of those courts shall have life tenure, assurance of steady compensation and authority to exercise the judicial power. Section 2 indicates that the judicial power extends to "[t]he Trial of all Crimes. . . ."

Neither a referee in bankruptcy nor a bankruptcy judge was, is, or shall be an Art. III judge. He cannot preside over a criminal trial. If the conduct described in the September 1978 memorandum was criminal, or would support criminal contempt, the bankruptcy judge did not possess the competence or power or jurisdiction to hear it. *Cf. United States v. Raddatz,* —U.S.— , 48 USLW 4813 (1980) (Congressional delegation to magistrate to conduct criminal suppression hearing is not violation of Art. III since district judge can repudiate proposed findings of fact and recommendation of magistrate). According presumptive correctness to the referee's findings of the fee award (i.e. utilizing the clearly erroneous rule under Bankruptcy Rule 810) violated the spirit of *Raddatz.*

F. Jury Trial Right.

Criminal contempt of court calling for imprisonment for six months or more requires a jury trial as a matter of right under the Sixth Amendment. On the subject of conduct calling for a substantial fine the Supreme Court has not determined whether the Sixth Amendment provides a right to jury trial. *Muniz v. Hoffman,* 422 U.S. 454 (1977) ($10,000 fine against 13,000 member labor organization for criminal contempt did not require jury trial). However, two federal courts of appeals have held that a fine of $500 or more for criminal contempt of court under 18 USC Sec. 401 requires jury trial. *United States v. Hamden,* 552 F.2d 279 (9th Cir. 1977); *Douglas v. First National Realty Corp.,* 543 F.2d 894 (D.C. Cir. 1976).

But where a bankruptcy memo describes purported conduct which could have been cited as criminal contempt, where a fee award is levied against an individual 72 times the $500 fine in 18 USC Sec. 401 and 182% greater than the $20,000 levied against the Arkansas Department of Corrections in *Hutto v. Finney,* 437 U.S. 678 (1978) for repeated violations of court orders resulting in the continued brutalization of state prison inmates, a jury trial right should be granted to the individual petitioner, as well as the petitioners where the *bias* of the bankruptcy judge is suspect, *Muniz v. Hoffman,* 422 U.S. 454 (1977).

X. PROFESSIONAL, ETHICAL DUTY ON PETITIONERS' COUNSEL ENTITLED HIM TO QUALIFIED IMMUNITY

A. Duty

1. *Under Georgia Law*

DR1—103(A) places Georgia attorneys under an *obligation* to report ethical violations.

2. *Under Federal Law*

Fifth Circuit attorneys are likewise under an obligation to report misfeasence. *In re Gopman*, 501 F.2d 262 (5th Cir. 1976).

B. Qualified Immunity

The Georgia State Bar is an arm of the Georgia Supreme Court established to regulate and enforce ethical standards. *Ga. Code Ann.* Sec. 6—701. As such, the bar shares the Georgia Supreme Court's immunity from damage suit in its enforcement role. *See, Supreme Court of Virginia v. Consumers' Union of the United States*, ___ U.S. ___, 48 U.S.L.W. 4620 (1980). Since the bar depends upon attorneys themselves for enforcement effective regulation demands attorneys receive the same qualified immunity from damage suit. See footnote 11, pp. 7-8.

XI. CONCLUSION

Petitioners' reasonable conduct in face of collusion does not merit retaliatory fee award.

Respectfully submitted,

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XII. CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Petitioners' Joint Appendix upon each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to counsel at their last known addresses.

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This 2 day of September, 1980.

W. Kent Bishop